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SERVICE DATE – MARCH 8, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 183)

SALT LAKE CITY CORPORATION
— ADVERSE ABANDONMENT —
IN SALT LAKE CITY, UT

Decided: March 6, 2002

On November 13, 2001, Salt Lake City Corporation (City) filed an application under 49 U.S.C. 10903 requesting that we find that the public convenience and necessity require or permit the adverse abandonment of a 1.32-mile portion of the "900 South Line," between milepost 781.0 and milepost 782.32 (Line), in Salt Lake City, UT.[1] The Union Pacific Railroad Company (UP) owns the Line and is presently operating over it. UP filed a protest to the application on December 28, 2001. We also received comments from individuals and local interests[2] and the Association of American Railroads (AAR). The City replied to UP's protest and the comments of AAR on January 22, 2002.[3] We will deny the abandonment application for the reasons discussed below.

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[1] Notice of the filing was served and published in the Federal Register (66 FR 60241-42) on December 3, 2001. The City's request for waiver of certain regulations relating to notice and filing requirements for abandonment applications was granted in part by a decision served on October 5, 2001.

[2] Commenters in support of abandonment include: Cherri Butters, Eldon Butters, J. Michael Clára (President of Salt Lake City Council of League of United Latin American Citizens), Katharine Deiss, MD, Nicholas Dokos, Richard Egan, R. Mont Evans (Riverton City Mayor-Elect), Ila Rose Fife (Board Member Precinct 2, Salt Lake City School District), Fred J. Fife III (State Representative, District 26), Irene Fisher (Executive Committee Chair of Bend-in-the-River Partnership), Henry and Beth Gerritsen, Phillip and Janette Gonzales, Christopher Hansen, Leon Johnson, R. Gene Moffitt (Gold Cross Services, Inc.), D.W. Procter, Barbara Rufenacht, Kevin Shumway, Salt Lake City County Council Members Joe Hatch and Jim Bradley, the Salt Lake City School District Board of Education, and Edie Trimmer (Chairwoman of Poplar Grove Community Council).

[3] The due date for the City's reply was extended from January 14 to January 22, 2002, by decision served on January 11, 2002.

BACKGROUND

The Line was constructed in 1905-1906, and became a part of a major main line used by passenger, mail and express trains between Salt Lake City and Los Angeles, CA. UP's predecessors originally operated over Salt Lake City street crossings pursuant to franchise ordinances passed by the Salt Lake City Council and approved by the Salt Lake City Mayor in 1905.[4] In addition to these ordinances, on March 20, 1989, the City and UP entered into an agreement in which the City granted to UP a franchise and right-of-way "to construct, operate and maintain standard gauge railroad tracks within the streets of Salt Lake City" (Franchise Agreement).

The Franchise Agreement covers 50 street crossings located on all UP lines in Salt Lake City, including three crossings on the Line. Under section 6 of the Franchise Agreement, the franchise expires on June 30, 2003, but is voidable at the option of the City under certain circumstances. One of those circumstances is non-use of the franchise lines for a period of 9 consecutive months.

Over time, the use of the Line changed and diminished. By the 1990s, service consisted of a daily local train serving the Line's remaining customers (and nearby trackage) and alternate through-route traffic. In 1997, UP agreed to cooperate with the City and the Utah Department of Transportation (UDOT) on the "Salt Lake City Gateway Area Redevelopment Project" (Gateway Project), designed to facilitate a major commercial and residential development in the area near the Line. To accommodate the Gateway Project, UP filed a petition for exemption to abandon three line segments within the project area. See Union Pacific Railroad Company—Abandonment Exemption—In Salt Lake County, UT, STB Docket No. AB-33 (Sub-No. 116X) (STB served Sept. 30, 1998). UP initially planned to abandon the Line as part of that proposal, but ultimately limited its abandonment filing to a contiguous 0.47-mile segment of the 900 South Line (from milepost 782.32 to milepost 782.79). UP explains that it retained the Line for future use as a freight bypass route for traffic moving between UP's main freight yard in Salt Lake City, the Roper Yard, and its main line west to Los Angeles and Oakland, CA. That traffic currently moves by a more circuitous route through an at-grade junction of three major rail lines known as Grant Tower.

Although UP did not seek authority to abandon the Line, it did suspend freight service over the Line in March 1999. The Gateway Project shortened three long expressway ramp viaducts, each of which extended a half mile or more from the Interstate Highway 15 (I-15) expressway, and one of which carried the I-15 expressway directly over the location where the

[4] There were two separate franchise ordinances granting crossing permission. One was to the Oregon Short Line Railroad Company, its successors and assigns, and the other was to the San Pedro, Los Angeles & Salt Lake Railroad Company, its successors and assigns.

Line crossed UP's Salt Lake City-Ogden Line at milepost 782.32. Because UDOT wanted to use the right-of-way for falsework for the new viaduct and for access to the construction site, UDOT requested that UP remove the track on the Line on both ends of its crossing with the Salt Lake City-Ogden Line. According to UP, it suspended freight service in March 1999, and would not have been able to resume service until June 2001, when the viaduct construction site was cleared and returned.[5] The City does not deny the construction blockage, but states that the suspension of operations was not entirely beyond UP's control and that, if UP had wanted to operate over the Line, UDOT would have accommodated it. Even though there was no freight service on the Line between March 1999 and December 2001, UP states that at no time did it intend to abandon the Line. To the contrary, UP claims that it always intended to resume freight service on the Line once a connection was built to the Salt Lake City-Ogden Line.

UP's plans for reactivating the Line include shifting 10-12 through freight trains per day from the route through Grant Tower to the Line. UP states that this should alleviate the bottleneck that UP is presently experiencing at the Grant Tower location, where UP is currently running 40-45 trains per day. In addition to reducing delays for the trains that will continue using the Grant Tower routing, UP estimates a savings of 7.5 hours per day for the 10-12 trains that will be rerouted through the Line.

In a letter filed on January 9, 2002, UP states that train operations resumed on December 26, 2001, consisting of test trains, and that freight train service resumed on January 5, 2002.[6]

Before UP reactivated the Line, the Honorable Ross C. Anderson, Mayor of the City, sent a letter to UP on August 3, 2001, purporting to exercise the City's option, under section 6 of the Franchise Agreement, to void and terminate UP's rights to use street crossings on the Line and directing UP to remove its tracks at such crossings by November 1, 2001. In response, UP filed a petition for declaratory order seeking a determination that the City could not sever or prevent operation over the Line without first obtaining adverse abandonment authority from the Board. In Union Pacific Railroad Company—Petition for Declaratory Order, STB Finance Docket No. 34090 (STB served Nov. 9, 2001) (Declaratory Order), we found that it was not necessary to institute a declaratory order proceeding and denied the petition because the law was clear that the

[5] UP states that it was prevented from constructing a new connecting track to the 900 South Line because the falsework for the new viaduct was in the way.

[6] One of UP's objectives was to have the full level of planned service in place before the start of the 2002 Winter Olympic Games in Salt Lake City, so that it could use the Line to route traffic away from the Olympic sites.

City's proposed action was precluded and that its only recourse was to seek adverse abandonment authority.[7]

POSITIONS OF THE PARTIES

In its November 13, 2001 application for abandonment of the Line, the City contends that, by voluntarily entering into the Franchise Agreement, UP agreed to waive its right to contest abandonment of the Line. As it did in the Declaratory Order proceeding, the City relies on section 9A of the Franchise Agreement, which provides that, upon the City's written request, UP shall promptly remove its tracks from the franchise area if one or more conditions occur, including a continuous 9-month period of non-use. The City alleges that UP has not used the Line for 9 consecutive months, as evidenced by UP's failure to operate trains on the Line for over 2 years. The City purports to terminate the Franchise Agreement under its terms and interprets the Franchise Agreement as requiring UP to seek abandonment authority from the Board. The City submits that, instead of fulfilling its obligation under the Franchise Agreement, UP is attempting to use our jurisdiction and its rail common carrier obligation as a shield from that contractual obligation.

In addition to the arguments about the Franchise Agreement, the City and the commenters raise a number of other factors that they assert support their request for abandonment. The Line runs through the center of a community of approximately 500 homes, with two elementary schools. In addition, it crosses a major thoroughfare, Redwood Road, which does not have an overpass. The concern is that, if the Line is reactivated, trains would block bus routes, slow traffic, interfere with emergency vehicles, and threaten the safety of residents, in particular school children. The City also raises potential environmental justice demographic claims. Specifically, it contends that reactivation of the Line would violate Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority and Low-Income Populations" (Environmental Justice Executive Order), 59 FR 7629 (Feb. 11, 1994), because the resumption of service on the Line would have a disproportionate adverse impact on minority and low-income populations.

As discussed above, UP states that it has resumed service over the Line and plans to shift 10-12 freight trains per day from the route through Grant Tower to the Line. In addition, UP disputes the City's interpretation of the Franchise Agreement, noting that: (1) the Franchise

[7] We noted that the City appeared to recognize that the appropriate procedure for it to seek removal of the street crossings on the Line was to file an application for adverse abandonment and that it had in fact filed a notice of its intention to do so. See Declaratory Order, slip op. at 4.

Agreement contains no obligation for UP to seek authority to abandon the Line;[8] (2) UP has used the Line over the period of alleged non-use by running vehicles on the tracks for purposes of inspection and maintenance, which, it states, is a normal part of the use and operation of a rail line; (3) the City failed to meet the Franchise Agreement's procedural requirements to terminate by failing to provide notice and opportunity to cure, as required under section 9B of the Franchise Agreement;[9] (4) any non-use was due to City construction, which was beyond UP's control; (5) UP has continuing rights independent of the Franchise Agreement under the 1905 unexpired franchise ordinances; and (6) the Mayor had no authority under Utah law to order removal of crossings, because UDOT has exclusive authority over rail/highway grade crossings.

UP also states that it has been working with community leaders and school officials to address train service impacts on the community. As for the City's environmental justice argument, UP agrees with the position of the Board's Section of Environmental Analysis (SEA) on this issue, to be discussed infra, which is that the reactivation of the Line is not part of the adverse abandonment and that, therefore, environmental justice impacts, and other impacts associated with the reactivation of the Line are not part of the environmental review of the proposal before the Board.

DISCUSSION AND CONCLUSIONS

The statutory standard governing any application to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. 49 U.S.C. 10903(e). In implementing this standard, we balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. In adverse abandonment cases, where a noncarrier applicant seeks abandonment of a line of railroad over the objection of the railroad, the noncarrier applicant, in this case the City, has the burden of establishing that the PC&N require or permit the abandonment. See Chelsea Property Owners—Aban.—The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992) (Chelsea), aff'd sub nom. Consolidated Rail Corp. v. I.C.C., 29 F.3d 706 (D.C. Cir. 1994). If we find that it does, our exclusive and plenary jurisdiction is removed, thereby enabling the parties to undertake other legal remedies to compel the carrier to

[8] UP submits that the non-use provisions are clearly not meant to force it to seek abandonment authority of the underlying rail lines. Rather, UP views them as provisions designed simply to prevent the railroad from walking away from unwanted tracks, leaving the City with the cost of removal.

[9] Specifically, under section 9B, before requiring removal of tracks or related facilities, the City must provide UP with written notice specifying UP's failure to comply with the terms and conditions of the Franchise Agreement and giving UP 30 days to correct the failure.

leave the line and allow the property to be used for other purposes. See Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969 (1981) (Modern Handcraft).

As the agency has frequently stated, the function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See Modern Handcraft, 363 I.C.C. at 972. The Board has a statutory duty to preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See Chelsea, 8 I.C.C.2d at 779. On the other hand, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal interest exists. See CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002). With these standards in mind, we now examine the City's request for adverse abandonment authority.

The Franchise Agreement.

The cornerstone of the City's case for an adverse abandonment is the Franchise Agreement. Under the City's interpretation of the Franchise Agreement (which UP disputes), UP is contractually obligated to remove the tracks from the Line because of its failure to use the Line for 9 consecutive months. The obvious implication of the removal provision, according to the City, is that UP would take the necessary steps to permit removal of the tracks to occur, i.e., seek abandonment authority from the Board. Its failure to do so, and its attempt "to use the Federal regulatory structure as an excuse not to comply," in the City's opinion, puts UP in breach of contract.

The City argues that we should not sanction contractual breaches, nor allow our preemption authority to be used to shield a carrier from its own commitments. The City cites a number of cases in support of this proposition.[10] But all of the cases are inapposite. None of the cited cases deal with the abandonment of a line of railroad; rather they deal with preemption and

[10] The Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053 (STB served Dec. 1, 2000, and March 23, 2001); Jefferson Terminal Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served March 19, 2001); Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001); and Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District, Cheryl L. Rodgers, Clay Larkin, Kootenai Environmental Alliance, Railroad and Clearcuts Campaign, STB Finance Docket No. 33966 (STB served Aug. 15, 2001).

jurisdictional issues. (Three of the cases are petitions for declaratory order, and one is a revocation of an acquisition and operation exemption.)

In declining to grant UP's request that we institute a declaratory order proceeding, we found that the law was clear that the City could not enforce the Franchise Agreement requiring UP to remove its tracks from the Line, because such enforcement would be an attempt to regulate the abandonment of a line of railroad, which is exclusively within our jurisdiction. See Declaratory Order, slip op. at 3-4, and the cases cited there. We told the City that it could file an adverse abandonment application and seek to establish that the present or future PC&N require or permit abandonment of the Line, as the City has done. Now, in the context of the adverse abandonment proceeding, however, the City is attempting to use the same failed argument about the Franchise Agreement to carry its burden of proof on the PC&N issue. In the City's own words, it is not arguing that the Line merits "abandonment," but rather that UP has not used the Line and that the Board should not allow a carrier to voluntarily enter into an agreement such as the Franchise Agreement and then avoid its obligations under that agreement. While there is nothing wrong with that basic premise, as articulated in some of the cases cited by the City, it does not apply in this context because UP cannot voluntarily contract away our jurisdiction over the abandonment of this Line. In short, to prevail in this proceeding, the City must show that the PC&N require or permit abandonment; that is its burden of proof under the statute, which cannot be met solely through reliance on the Franchise Agreement.[11]

Public Convenience and Necessity Analysis.

A. Potential for Rail Service.

The record here does not support the conclusion that the PC&N require or permit abandonment. UP is operating over the Line, and states that it is ready, willing and able to operate over the Line in the future. Neither the Board, nor the Interstate Commerce Commission before it, has ever granted an adverse abandonment when the carrier was operating over the line. In The Western Stock Show Assn.—Aban. Exemption—In Denver, CO, 1 S.T.B. 113, 131-32 (1996), we reviewed the history of adverse abandonment applications and found that they were generally denied if there was a potential for continued operations and the carrier had taken reasonable steps to attract traffic. In one case where an adverse abandonment was granted, there had been something akin to a de facto abandonment – the carrier had not operated over the line in many years and had no feasible plans to do so in the future. See Modern Handcraft, 363 I.C.C. at 971.[12]

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[11] See AAR's comments.

[12] See also Chelsea, where the ICC granted an adverse abandonment application when it (continued...)

That is not the case here. Although the City makes much of the fact that UP did not operate over the Line for more than 2 years, UP has shown that it intended to use the Line again[13] and is now doing so. Thus, unlike the cases where adverse abandonment authority has been granted, there clearly is a potential for continued rail freight service here.

The City contends that we should take into account in our analysis alternative routes that UP could use instead of the Line. But UP has explained the bottlenecks and congestion in the Grant Tower area and has submitted evidence supporting the benefits of using the Line to increase velocity, reduce congestion, and increase capacity on its main lines through the Salt Lake City area. UP does not need our permission to reactivate the Line or to reroute its trains,[14] and it would be inappropriate to substitute our judgment for UP's business judgment.

B. Safety, Traffic, and Quality of Life Concerns.

As far back as 1995, the City viewed UP's use of the Line as "creating conflicts" with the City's plans for the area. The City and commenters have discussed recent attempts to improve the community near the Line. They are concerned that the reactivation of the Line will seriously undermine their improvement efforts, raising three main issues: (1) safety; (2) traffic; and (3) quality of life.

The safety concerns consist primarily of the Line's proximity to houses and schools. UP, however, states that the Line poses no unusual safety hazards not normally associated with rail lines in populated areas.[15]

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[12](...continued)
found that the subject line had been out of service for at least 10 years and there was no possibility of restoring service.

[13] The City contends that at one point UP attempted to market and sell the Line's right-of-way and that this contradicts UP's statement that it always intended to use the Line. UP, however, explains that the right-of-way was marketed by its real estate department by mistake. When that mistake was discovered, the right-of-way was promptly taken off the market.

[14] See Lee's Summit MO v. STB, 231 F.3d 39, 42-43 at n.3 (D.C. Cir. 2000) (Lee's Summit); Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995); Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998) (Jude).

[15] Nevertheless, to address the community's concerns, UP has worked with community
(continued...)

The traffic concerns include delay of emergency vehicles, interference with public bus routes, and longer commute times for motorists. These concerns stem primarily from the Line's crossing of Redwood Road, a major thoroughfare in the area. The City does not argue that alternative routes do not exist, however, and the commenters state only that using alternative routes will cause delay. Moreover, for the 10-12 trains a day UP expects to operate on the Line, UP estimates that each train will only cause a 2-3 minute delay at street crossings at 30 m.p.h. (or approximately the time of one traffic light cycle).

Finally, the City and commenters contend that the trains will decrease the quality of life in the surrounding community. They are concerned about the noise and vibrations from trains passing close to houses and schools, and assert that property values will drop or have already dropped in anticipation of UP's resumption of service over the Line. They are also concerned about the Line's potential negative impact on the environment, including neighborhood parks and trails, and the possibility of hazardous materials accidents.

We have weighed the safety, traffic and quality of life concerns raised by the community and find that they do not outweigh the overriding Federal interest in maintaining this Line as part of the interstate rail network. Rail operations were previously conducted on the Line, and the Line was never authorized to be abandoned. Thus, as discussed above, UP's reactivation – which it can undertake without our approval – will merely continue rail operations by UP on the same line. While the community's concerns are understandable, they are not unique to this Line. Similar concerns are shared by communities on other rail lines throughout the nation. UP also has worked with the community to ameliorate problems associated with the reactivation, and we encourage UP to continue to do so.

C. The City's Other Claims.

The City argues that, in determining whether the PC&N require the continued operation of the Line, there is no doubt where the interests of the public lie. In its reply to UP's protest, the City faults UP for failing to evaluate, analyze, or assess the "public's convenience" or the "public

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[15](...continued)
leaders and school officials to address train service impacts. UP has offered to provide Operation Lifesaver Grade Crossing Safety presentations to Parkview Elementary School. Safety video programs (some in both English and Spanish) were sent directly to Parkview Elementary for its resource library and to the Superintendent for use on a local cable channel. UP also distributed bilingual notices to Parkview Elementary students notifying parents about train operations and safety measures. Further, UP states that a UP Operation Lifesaver volunteer will monitor the Navajo and Emery Street railroad crossings, observe the children's behavior and provide safety education at the school, if needed. UP has also offered to fund additional school crossing guards at the Navajo and Emery Street rail crossings for an additional 1- to 3-month period.

necessity." According to the City, what must be considered is the interest of the entire public, not just the interests of UP and its shippers. The City also claims that UP has introduced no evidence from shippers and no evidence that the market mandates the use of the Line rather than an alternative route. Therefore, the City argues that UP has not met its burden, and that the City's abandonment application should be approved.

The City is attempting to rewrite the PC&N test to fit its own purposes. While we have balanced the interests of the community in our analysis of whether the present or future PC&N require or permit abandonment of the Line, it is only one factor in our analysis. Furthermore, the burden to show that the PC&N require or permit abandonment here is on the City, not on UP, and the City's attempt to shift that burden to the railroad is contrary to the statute and the case law interpreting it. And, it is well settled that, even where track has not been recently used, the owner of a rail line that has not been authorized to be abandoned may rehabilitate or reroute traffic over it without any Board authority or environmental review. See Lee's Summit; Jude.

Environmental Justice Claims.

The City argues that UP's plan to reactivate this line will be contrary to the Environmental Justice Executive Order. In accordance with the National Environmental Policy Act and the Board's environmental rules, SEA prepared an Environmental Assessment (EA) in this proceeding, served on December 14, 2001, addressing the potential impacts of the proposed abandonment and Post EA recommendations addressing the comments received on the EA, dated January 18, 2002. SEA concluded that the proposed abandonment does not warrant an environmental justice demographic analysis because abandonment of the Line would not adversely affect the community. We agree with SEA that it is the abandonment of the Line, not the reactivation of service over it, that is at issue here. Because the environmental justice claims all relate to the effect of increased train traffic on the Line, not abandonment of the Line, environmental justice issues are beyond the scope of this proceeding.

Conclusion.

In sum, for the reasons discussed above, we conclude that the City has not met its burden of proof. Accordingly, the City's application will be denied. Our denial of the application moots labor protection and environmental issues related to the abandonment proposal.

We find:

The present or future PC&N does not require or permit the proposed adverse abandonment of the Line.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's adverse abandonment application is denied.

2. This decision is effective April 7, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary